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In re: NIKOLAOS G. LAGOGIANNIS a.k.a. Nick G. La Gogiannis
a.k.a. Kikos G. Lagogiannis a.k.a. Nilolols Lagogiannis a.k.a. Nikos Lagogiannis
a.k.a. G. Nick Lagogiannis a.k.a. Nick G. Lagoniannis
a.k.a. Nikolaos G. Lagogiannis a.k.a. Nick Lagogiannis a.k.a. Nikos Lavoyianis
a.k.a. Nikolaos Logogiannis

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thanos Kanellakos, Esquire
1805 Eastern Avenue
Baltimore, Maryland 21231

ON BEHALF OF SERVICE: Jeffrey T. Bubier
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination of proceedings

The Immigration and Naturalization Service has timely appealed an Immigration Judge's March 5, 1999, oral decision terminating the respondent's removal proceedings. On appeal, the Service contests the Immigration Judge's termination of proceedings, arguing that under *Matter of Magallanes*, Interim Decision 3341 (BIA 1998), the respondent's conviction for driving while intoxicated is an aggravated felony under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F), as a crime of violence and that he is therefore removable as an aggravated felon. The respondent contends that the Immigration Judge was correct in distinguishing his conviction from that addressed in *Matter of Magallanes*, and in finding that he is therefore not removable. We will sustain the Service's appeal.

On April 24, 1998, the respondent was convicted of Operating a Motor Vehicle Under the Influence of Alcohol, in violation of N.Y. Veh. & Traf. Law § 1192, subdivision 3 (driving while intoxicated) and sentenced to imprisonment for 1 year. Based on this conviction, the Service charged the respondent with removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act (crime of violence).

The Immigration Judge concluded that the respondent's conviction under the New York statute is not a crime of violence. In reaching this conclusion, the Immigration Judge noted this Board's decision, *Matter of Magallanes*, *supra*, in which we held that the offense of aggravated

driving or actual physical control while under the influence of intoxicating liquor or drugs under Ariz. Rev. Stat. Ann. § 28-692(A)(1), is a crime of violence. The Immigration Judge distinguished the respondent's offense, emphasizing that the respondent's conviction did not involve the aggravated factor of driving with a suspended license which was an element of the offense involved in *Matter of Magallanes, supra*. The Immigration Judge stated in his decision that *Matter of Magallanes, supra,* was limited by its facts to situations where the alien was driving with a suspended or revoked license (I.J. at 11). The Immigration Judge errs in construing our decision in *Matter of Magallanes* so narrowly.

To determine whether a conviction is for a crime of violence, we use the two-step analysis set forth in 18 U.S.C. § 16. Under 18 U.S.C. § 16(a), an offense is a crime of violence if physical force is an element. Under 18 U.S.C. § 16(b), an offense is a crime of violence if it is a felony and if the nature of the crime, as defined by the statute, involves a risk that physical force would be used against the person or property of another. *Matter of Puente*, Interim Decision 3412 (BIA 1999); *Matter of Sweetser*, Interim Decision 3390, at 5-6 (BIA 1999); *Matter of Alcantar*, 20 I&N Dec. 801, 812 (BIA 1994).

The respondent was convicted of the offense of operating a motor vehicle while under the influence of alcohol or drugs which is defined in N.Y. Veh. & Traf. Law § 1192, subdivision 3 (driving while intoxicated), as: "Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition." This offense does not specify as an element the use or threat of physical force, we therefore will only analyze the offense under 18 U.S.C. § 16(b).

The respondent contends that the Immigration Judge correctly found that his conviction was not a crime of violence. He argues that the Immigration Judge was correct in determining that his conviction is not analogous to the conviction in *Matter of Magallanes, supra*, because driving on a suspended license is not an element of the offense. We disagree. While the offense in *Matter of Magallanes, supra*, involved driving under the influence with a suspended or otherwise restricted license, our analysis related solely to the risk that an injury would result from force being used due to driving under the influence. Our analysis did not relate to the fact that the alien was driving with a suspended license. Moreover, the respondent has not shown that the risk of injury is substantially different when a person is driving with a valid license than with a suspended or revoked license.[1]

We also note that, like in *Matter of Magallanes*, the respondent's offense has been elevated to a felony offense because of prior similar misconduct. The record indicates that the respondent's conviction is a class E felony because the respondent was convicted of at least one

[1] We note that, in connection with the same incident, the respondent was also convicted of operation while license or privilege is suspended or revoked, in violation of N.Y. Veh. & Traf. Law § 511, subdivision 3, (aggravated unlicensed operation of a motor vehicle in the first degree). This offense is also a class E felony under the New York statute. However, in that he was sentenced to less than 1 year on this count, it does not form the basis for a crime of violence aggravated felony charge.

other drunk driving offense within the preceding 10 years. *See* N.Y. Veh. & Traf. Law §§ 1193(1)(c), (4)(i). Therefore, for purposes of determining whether the offense at issue in this appeal is a crime of violence, we find no meaningful distinction between the respondent's conviction and the conviction addressed in *Magallanes*.

The Immigration Judge opined that we applied an incorrect standard in *Matter of Magallanes, supra*. His decision states that we analyzed whether drunk driving presents a risk of *harm* to the person or property of another rather than whether it presents a substantial risk that *force* may be used in the commission of an offense as required under 18 U.S.C. § 16(b). The Immigration Judge's analysis appears to be that while the offense of driving while intoxicated may involve a risk of injury or harm, it does not involve a risk that force will be used. Citing to *United States v. Rutherford*, 54 F.3d 370, 377 (7th Cir. 1995), and *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992) he reasoned that in order to be a crime of violence, the offense must be a specific intent crime because "use" of physical force implies a specific intent (I.J. at 13).

In recent decisions, *Matter of Puente, supra*, and *Matter of Sweetser, supra*, we clarified our decision in *Matter of Magallanes, supra*. In *Matter of Sweetser*, we stated that "despite the risk of 'harm' language, *Matter of Magallanes* turned on the question whether there was a substantial risk of 'physical force' being used against people or property." *Matter of Sweetser, supra*, at 9. We explained that the risk of injury in *Magallanes* was "directly related to the substantial risk that the driver, while operating his motor vehicle, would use physical force to cause the injury." *Id.*

More recently, we also specifically rejected the very analysis employed by the Immigration Judge in the instant case regarding the need for specific intent in order for an offense to encompass a section 16(b) crime of violence. In *Matter of Puente, supra*, at 8-9, n. 4, we followed our decision in *Matter of Alcantar*, 20 I&N Dec. 804, 809 (1994), in holding that section 16(b) is not limited to crimes of specific intent. Indeed, the concept of "risk" seems quite divorced from that of "specific intent."[2] *See Matter of Puente, supra*, at 14 (Grant, E., concurring). In *Puente, supra*, we concluded that, as an inherently reckless act, felony drunk driving is an offense that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," and that

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[2] In *Puente, supra*, we deemed the analysis in *United States v. Parson*, supra, on which the Immigration Judge heavily relied, to be dicta. *See Matter of Puente, supra*, at n. 4. The Third Circuit's comments are dicta because the issue in *Parson* was interpretation of the different definition of "crime of violence in the Sentencing Guidelines. The Third Circuit specifically stated that "[t]he language of the revised Guideline definition of 'crime of violence' is considerably different from the language that Congress chose [in 18 U.S.C. § 16] . . ." and that they were to decide "whether Parson's reckless endangering conviction was for a 'crime of violence' under the current Guidelines rather than under 18 U.S.C. § 16." *Parson, supra*, at 866. We further note that reliance on the Seventh Circuit's opinion in *United States v. Rutherford*, is likewise misplaced, as when discussing specific intent, the court was construing the "use of force" language in the context of a sentencing guidelines provision that was virtually identical to section 16(a), not 16(b). *See Matter of Puente, supra*, at 13-14 (Grant, E., concurring).

it is thus encompassed within section 16(b). *Matter of Puente, supra*, at 9. We accordingly find that the respondent has been convicted of a crime of violence aggravated felony as defined by 18 U.S.C. § 16(b) and section 101(a)(43)(F) of the Act.

Finally, we will briefly address the Immigration Judge's alternate basis for finding that the respondent has not been convicted of an aggravated felony. Section 101(a)(43)(F) provides that a crime of violence for which "the term of imprisonment at least 1 year" is an aggravated felony. The Immigration Judge suggests in his opinion that "at least 1 year" means "more than one year" (I.J. at 17). However, we have interpreted that section of the statute as indicating that a conviction for a crime of violence for which a sentence of 1 year is imposed constitutes an aggravated felony conviction. *Matter of L-S-J-*, Interim Decision 3322, at 2 (BIA 1997). In addition, the Third Circuit has recently issued a decision in which it acknowledged the apparent missing word in the identical phrasing in section 101(a)(43)(G) (theft offenses) of the Act, and held that an alien who commits a theft offense and is sentenced to a term of imprisonment of exactly 1 year, regardless of the minimum sentence available under the criminal statute at issue, is an aggravated felon under section 101(a)(43)(G) of the Act. *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999). We likewise conclude that the respondent's 1 year sentence satisfies the "at least 1 year" criteria of section 101(a)(43)(F).

We therefore find that the respondent has been convicted of a crime of violence as defined in section 101(a)(43)(F) of the Act, and is therefore removable under section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony. We will accordingly sustain the appeal, vacate the Immigration Judge's order terminating these proceedings, and remand the record for a determination of whether the respondent is eligible for any relief from deportation.

ORDER: The appeal is sustained, the Immigration Judge's order terminating proceedings is vacated, and the record is returned to the Immigration Judge for further proceedings consistent with this decision.

FOR THE BOARD